Supreme Court, U.S.
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No. 94-737

In The

# Supreme Court of the United States

October Term, 1994

James O'Leary,

*Petitioner,*

v.

County of Sacramento,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR RESPONDENT

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19 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Does the plaintiff-appellant show contact with the official county seal to establish standing in order to bring a challenge to the use of the county name "Sacramento" on the official county seal and to allege that the seal violates the Establishment Clause of the First Amendment because the English translation from the Spanish word "sacramento" means "sacrament?"

2. Did the plaintiff fail to properly serve the County of Sacramento by serving a Deputy County Clerk of the County Clerk's Office in the county courthouse as opposed to a qualified official for service of process of the County of Sacramento?

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**CITATIONS OF OPINIONS AND JUDGMENTS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA**

1. United States Court of Appeals for the Ninth Circuit, No. 93-15767, D.C. No. CV-91-01246-EJG Eastern California (Sacramento), James O'Leary v. County of Sacramento, Order, denying plaintiff-appellant's petition for rehearing, order filed July 20, 1994, before Circuit Judges Schroeder, Canby, and Wiggins.

2. United States Court of Appeals for the Ninth Circuit, No. 93-91-01246-EJG, James O'Leary v. County of Sacramento, Memorandum, on remand for this court the plaintiff-appellant's appeal of the district court's dismissal of his action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(5) for lack of standing is affirmed, Memorandum was filed March 1, 1994, and before Circuit Judges Schroeder, Canby, and Wiggins.

3. United States District Court for the Eastern District of California, Civ. No. S-91-1246 EJG/JFM, James O'Leary v. County of Sacramento, Order Dismissing Complaint, the amended complaint is dismissed without leave to amend because the complaint is again defective for lack of standing and for defective service of process, dated March 25, 1993 by Edward J. Garcia, Judge, United States District Court, filed on March 26, 1993.

4. United States District Court for the Eastern District of California, Civ. No. S-91-1246 EJG/JFM, James O'Leary v. County of Sacramento, Order, on remand from the Ninth Circuit Court of Appeals, plaintiff-appellant's

complaint is dismissed without prejudice based upon lack of standing and lack of service of process with leave to amend within 20 calendar days, Order dated January 28, 1993, by Edward J. Garcia, Judge, United States District Court, and filed January 29, 1993.

5. United States Court of Appeals for the Ninth Circuit, No. 92-15209, DC No. CV-91-01246-EJG, James O'Leary v. County of Sacramento, Order, plaintiff-appellant's petition for rehearing is denied, before Choy, Sneed, and Skopil, Circuit Judges.

6. United States Court of Appeals for the Ninth Circuit, No. 92-15209, CT/AG#: CV-91-01-246-EJG(JFM), James O'Leary v. County of Sacramento, Order reversing and remanding judgment of District Court, filed and entered October 5, 1992, and Memorandum, filed October 5, 1992, remanding the matter to the District Court for determination of the issues of standing and service of process before deciding the matter on the merits, before Choy, Sneed, and Skopil, Circuit Judges.

7. United States District Court for the Eastern District of California, Civ. No. S-91-1246 EJG/JFM, James O'Leary v. County of Sacramento, Order, dismissal of complaint with prejudice for failure to state a claim, dated January 14, 1992, by Edward J. Garcia, Judge, United States District Court, Order filed January 16, 1992.

## STATEMENT OF JURISDICTION

Jurisdiction is pursuant to 28 U.S.C.A. Section 1254 subdivision (1), the United States Supreme Court may

review cases of the court of appeals by writ of certiorari granted upon the petition of any party to any civil case after rendition of judgment or decree.

Subject matter jurisdiction rests upon that of a Federal Question, i.e., whether or not the use of the county's name "Sacramento" on an official county seal violates the Establishment of Religion Clause of the First Amendment. U.S. Const., Amend. I; 28 U.S.C.A. Section 1331.

The petition for the writ of certiorari is timely as it is brought within 90 days from the denial of the petition for rehearing by the District Court. The District Court denial of rehearing was filed on July 20, 1994, and this petition for a writ of certiorari was filed, pursuant to the plaintiff-appellant's representations, on September 30, 1994. United States Supreme Court Rules of Court, Rule 13.

Of course, it is the contention of the Respondent-County that the court lacks jurisdiction to hear this matter for lack of service of process and because the plaintiff-appellant has failed to establish standing to bring this action.

## CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

United States Constitution

Article III Section 2 Subdivision (1)

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

This petition for writ of certiorari focuses on one issue: Has plaintiff shown personal contact with the official county seal of the County of Sacramento which includes the name of the county "Sacramento" which plaintiff alleges has caused him to suffer an injury in fact since the English translation of the Spanish word "sacramento" means sacrament and thus plaintiff-appellant alleges that such name on the county seal is an establishment of religion in violation of his First Amendment rights?

1. On September 18, 1991, the plaintiff filed the complaint in this above-entitled action, in the United States District Court, Eastern District of California. The complaint alleged that plaintiff's First Amendment rights, in particular, the Establishment of Religion Clause, had been violated because the use by the County of Sacramento of its name "Sacramento" in its official county seal literally means the "sacrament" when translated to the English language from the Spanish language and that as such the County was fostering the establishment of the Roman Catholic religion and thus causing him great anguish.

2. On or about September 23, 1991, the plaintiff attempted service upon the County by certified mail upon an employee of the Superior Court of the State of California, County of Sacramento, to wit: a supervising legal filing process clerk. The clerk signed a receipt at the United States Post Office for the summons and complaint in the above-entitled action.

3. On October 15, 1991, the County filed a motion to dismiss the action based upon the Federal Rules of Civil Procedure, Nos. 12(b)(1), 12(b)(2), 12(b)(3), 12(b)(4), 12(b)(5), and 12(b)(6). The motion was based on the following grounds: that the complaint failed to state a claim; that the court lacked subject matter jurisdiction because there was no federal question; that the alleged federal question was frivolous and unsubstantial; that there was lack of jurisdiction over the County because of lack of proper personal service; and finally, that there was insufficient service of process. On December 6, 1991, plaintiff filed a written opposition with points and authorities to the County's motion.

4. On January 10, 1992, the County's motion to dismiss was heard in the District Court, Department 4 thereof, the Honorable Edward J. Garcia, Judge, presiding. The matter was submitted at that time without oral argument. On January 14, 1992, the Honorable Edward J. Garcia issued his written order and decision dismissing the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) with prejudice to refiling. On January 16, 1992, the judgment was entered on such order by the Clerk of the Court.

5. On January 21, 1992, plaintiff filed a notice of appeal. On October 30, 1992, the United States Court of Appeals for the Ninth Circuit reversed and remanded the case to the District Court. The Court of Appeal held that it was error for the District Court to have reached the merits and have dismissed the case before determining whether plaintiff had standing to sue and before determining whether the District Court had personal jurisdiction over the County. Accordingly, the Court of Appeal directed the District Court to determine plaintiff's standing and adequacy of service of process upon the County.

6. On January 29, 1993, the District Court granted the County's motion to dismiss with leave to amend pursuant to F.R.C.P. 12(b)(2) and 12(b)(5) based upon plaintiff's insufficient service of process and failure to establish standing.

7. On February 16, 1993, an amended complaint was filed by the plaintiff and on March 26, 1993, the District Court dismissed that complaint without leave to amend as the plaintiff had failed to establish standing, Rule

12(b)(1), and failed to properly serve process upon the County, Rule 12(b)(5).

8. On March 1, 1994, the United States Court of Appeals for the Ninth Circuit on appeal by the plaintiff, sustained the dismissal of plaintiff's complaint by the District Court without leave to amend based upon the plaintiff-appellant's failure to establish standing, Rule 12(b)(1) and 12(b)(5).

9. On July 20, 1994, the United States Court of Appeals for the Ninth Circuit, denied the plaintiff-appellant's petition for rehearing.

10. On September 30, 1994 the petitioner-appellant filed a Petition for Certiorari with the United States Supreme Court.

## SUMMARY OF ARGUMENT

1. This case presents no issue appropriate for the court's exercise of its discretionary jurisdiction in order to review this case on a writ of certiorari. It does not involve an undecided issue of federal law and does not involve the decision of a United States Court of Appeals in conflict with the decision of another United States Court of Appeals. Rule 10, United States Supreme Court.

2. Petitioner alleges in his complaint that his First Amendment rights, in particular, the Establishment of Religion Clause, has been violated because the use by the County of Sacramento of its name "Sacramento" in its official county seal literally means the "sacrament" when

translated from the Spanish language to the English language and that as such the County is fostering the establishment of the Roman Catholic religion and thus causing him great anguish.

Plaintiff does not allege that he is directly affected by actual observation of the logo or any connection or contact with the logo. In fact, he resides in a different county, Yolo County, as opposed to the County of Sacramento. In order to establish standing at least minimal personal contact with government's practice is required. Allegations of indignation or offense without at least some personal contact is not sufficient to establish standing. To have standing plaintiff must establish that there is (1) an actual or threatened personal injury, (2) that is traceable to the County's unlawful conduct, and (3) that such personal injury is likely to be redressed by a favorable decision of the court. All three elements must be established. The petitioner fails to establish the second requirement listed above, i.e., causation for his alleged distress and anguish; and therefore, fails to establish a required element of standing in order to bring this action.

3. The United States Supreme Court lacks jurisdiction to hear this matter as proper service of process over the Respondent-County was never accomplished by the Petitioner.

## ARGUMENT

### I.

### THE COURT OF APPEALS PROPERLY SUSTAINED THE DISMISSAL OF THE COMPLAINT BY THE DISTRICT COURT UPON PETITIONER'S FAILURE TO ESTABLISH THE CAUSATION NECESSARY FOR STANDING

Article III of the United States Constitution limits the "judicial power" of the United States to the resolution of "cases and controversies." A plaintiff must in his complaint allege an actual or threatened injury in order to bring a federal claim. Such a personal stake in litigation is called "standing." Without standing, the court lacks jurisdiction. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471; 102 S.Ct. 752, 757; 70 L.Ed.2d 700 (1982).

To have standing, plaintiff must establish that there is: (1) an actual or threatened personal injury, (2) that is traceable to the County's unlawful conduct, and (3) that such personal injury is likely to be redressed by a favorable decision of the court. All three elements must be established. *Allan v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *Lujan v. Defenders of the Wildlife*, 112 S.Ct. 2130, 2136 (1992); *Snake River Farmers' Assoc. v. Department of Labor*, 9 F.3d 792, 795 (9th Cir. 1993). The party seeking to invoke federal jurisdiction bears the burden of alleging facts sufficient to establish standing. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

The alleged injury must be an injury in fact and plaintiff must be directly affected by the laws or practices

to which his complaints are directed. Although the injury may be noneconomic, plaintiff must be personally affected. *Valley Forge*, supra, 454 U.S. at p. 486 n.22, 102 S.Ct. at p. 766, n.22; *City of Los Angeles v. Lyons* 461 U.S. 95, 101-02 (1983); *Lujan*, supra, 112 S.Ct. 2130, 2136.

In his complaint (both the original and amended complaints), the plaintiff alleges that he has suffered injuries due to the County's use of the name "Sacramento," on the official County seal; in particular, that his First Amendment rights under the Establishment of Religion Clause of the United States Constitution have been violated because the name "Sacramento" means "sacrament" in Spanish and thus the use of such name on the County seal fosters the Roman Catholic religion. Having made this accusation, the plaintiff fails to show how this use of the County seal personally confronts him. The causation factor is missing in his allegations because he never alleges facts indicating how these injuries occurred. The petitioner never alleges that he ever observed the seal or ever came in contact with the seal. In fact, the complaint establishes that he lives in another county, Yolo County, as opposed to the County of Sacramento. He alleges that the use of the name "Sacramento" on the County seal has caused him injuries of "anger, shame, fright, humiliation, mental anguish, emotional distress, physical distress," and that he has been forced to "go underground" with his religion. But, the causation factor, i.e., contact with that seal that brought upon those "injuries," is never mentioned. At least minimal personal contact with government's practice is required to establish standing. *Foremaster v. City of St. George* 882 F.2d 1485, 1491 (10th Cir. 1989); *Murray v. City of Austin*, 947 F.2d 146, 151 (5th

Cir. 1991). Allegations of indignation or offense without at least some personal contact is not sufficient to establish standing. *Harris v. City of Zion*, 927 F.2d 1401, 1406 (7th Cir. 1991).

Absent allegations in the complaint that the injuries alleged are traceable to the County's unlawful conduct, i.e., some personal contact, the complaint fails for lack of standing. Accordingly, the Court of Appeals did not err in sustaining the District Court's dismissal of the action for lack of standing.

## II.

## THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION DUE TO INSUFFICIENT SERVICE OF PROCESS PURSUANT TO RULES 12(b)(2) and 12(b)(5)

Pursuant to the declaration of Cheri Fairchild filed with the County's motion to dismiss, the original complaint and summons was served by the plaintiff upon a court filing clerk of the State of California Superior Court. This individual was served by certified mail and she receipted for the documents when she picked up the documents at the U.S. Post Office. The summons was addressed to the "County of Sacramento, c/o County Clerk, 720 Ninth Street, Sacramento, California." Federal procedure provides for service upon a local governmental entity according to the procedure used by the state for service of process. F.R.C.P. 4(d)(6). The amended complaint was never properly served upon any appropriate county official authorized to accept service.

Service by certified mail upon the "County Clerk" or a Superior Court filing clerk is not authorized service in the State of California. California requires the delivery of a copy of the summons and complaint " . . . to the clerk, secretary, president, presiding officer, or other head of the governing body." California Code of Civil Procedure Section 416.50.

The amended complaint was never properly served upon the County as a copy thereof was mailed to the Deputy County Counsel challenging this lawsuit and the service thereof.

If the defendant, regardless of notice, is a municipal corporation and was not served by a method provided by F.R.C.P. 4, plaintiff's complaint is subject to dismissal. *Cambridge Mutual Fire Insurance Co. v. City of Claston,* Georgia, D.C. Ga. 1982 96 F.R.D. 175.

Having failed to properly serve a local governmental entity, the District Court properly dismissed the complaints for lack of personal jurisdiction of the defendant due to insufficient service of process pursuant to F.R.C.P. 12(b)(2) and 12(b)(5).

## III.

## THIS CASE IS INAPPROPRIATE FOR EXERCISE OF THE SUPREME COURT'S DISCRETIONARY JURISDICTION IN ORDER TO REVIEW THE CASE ON A WRIT OF CERTIORARI BECAUSE THERE ARE NO CONFLICTING COURT OF APPEALS' DECISIONS ON THIS SUBJECT OF STANDING

This case presents no issue appropriate for the court's exercise of its discretionary jurisdiction in order to

review this case on a writ of certiorari. It does not involve an undecided issue of federal law and does not involve the decision of a United States Court of Appeals in conflict with the decision of another United States Court of Appeals. Rule 10, United States Supreme Court Rules.

The issue of standing has been widely covered by numerous federal cases, both United States Court of Appeals and United States Supreme Court cases. Such cases have also been decided in the context of the Establishment of Religion Clause of the First Amendment. Therefore, this case presents no new issue to be decided by this Court. Such cases have been cited in the body of this brief. There also appear to be no decisions which conflict one with another on this subject. Clearly, the decision of the Court of Appeals for the Ninth Circuit is in keeping with the principles of the cases cited in this brief on the issue of standing.

Therefore, pursuant to the criteria listed in Rule 10 of the United States Supreme Court Rules, this case ought not to be reviewed by writ of certiorari.

## CONCLUSION

The above-mentioned authorities establish that this honorable court ought not to exercise its discretion and review this case by writ of certiorari. It is well established in the law that a plaintiff must establish that the defendant's unlawful conduct is the cause for his alleged injuries. Failing to establish such causation, the defendant fails to establish his standing. Numerous cases have been cited for this proposition in this brief. In this case, the

petitioner alleges physical and mental distress and that he has had to take his religion "underground", but the plaintiff never alleges that the official county seal with the name of the county "Sacramento" inscribed thereon is in fact the cause of such anguish since he never indicates that he has had any contact with that seal.

Furthermore, it is apparent that the petitioner never properly secured service over the County as he never served a County official capable of accepting such service under the law.

Therefore, petitioner has failed to establish a cause of action in this matter by failing to establish his standing. Accordingly, it is respectfully requested that this honorable Court not exercise its discretionary jurisdiction and that this petition for writ of certiorari be denied.

Respectfully submitted,

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